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Leveling Localism and Racial Inequality Through the No Child Left Behind Public Choice Provision

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LEVELING LOCALISM AND RACIAL INEQUALITY IN EDUCATION THROUGH THE NO CHILD LEFT BEHIND ACT PUBLIC CHOICE PROVISION

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School district boundary lines play a pivotal role in shaping students' educational opportunities. Living on one side of a school district boundary rather than another can mean the difference between being able to attend a high-achieving resource-enriched school or having to attend a low-achieving resource-deprived school.

Despite the prominent role that school district boundary lines play in dictating educational opportunities for students, remedies formulated by the federal judiciary—the institution frequently looked upon to address issues of school segregation and inequality—are ineffective in ameliorating disparities between school districts. They are ineffective because the federal judiciary evidences a doctrinal preference for localism in its school equity jurisprudence. This doctrinal preference for localism has led the federal judiciary to, among other things, find inter-district school desegregation plans unconstitutional while upholding the constitutionality of school financing schemes with gross disparities in per-pupil spending between school districts.

This Article suggests that a new remedial paradigm that embraces regionalism as an antidote to the localism found in the federal judiciary's school equity jurisprudence is necessary to combat segregation and inequality between school districts. One potential remedial solution lies in the No Child Left Behind Act public choice provision, which allows students to transfer from a failing school to a non-failing one. This Article argues that Congress should amend the public choice provision during NCLB's next re-authorization by adopting a statutory framework similar to the framework found in portions of the Fair Housing Act, which embraces regionalism and citizen mobility as a means of facilitating integration and equality.

INTRODUCTION

"I thought I would actually have a choice," said Christine Bryant, whose son Tevin attempted to exercise his right under the federal No Child Left Behind Act to transfer from Towers High School in DeKalb

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County, Georgia to a better-performing school.[1] Towers High School has an enrollment that is ninety-five percent African-American.[2] Sixty-seven percent of the student body is considered socio-economically disadvantaged.[3] At the time Tevin attempted to transfer from Towers High School, the school failed to satisfy academic proficiency requirements under the No Child Left Behind Act for three consecutive years.[4] Ten of the twenty-one high schools in the DeKalb County School District where Towers High School is located also failed to satisfy No Child Left Behind academic proficiency requirements. The nine schools that satisfied the testing requirements could not accommodate transfer requests by Tevin and fifteen hundred students who sought to transfer.[5] As a result, Tevin was presented with only two options: transfer to a vocational/technical school or take online courses.[6]

Much of the segregation and inequality that characterizes education in America today occurs along school district boundary lines. While it is now illegal to deny children equal educational opportunities because of their race,[7] it is perfectly legal to provide disparate education opportunities to children based on where they live. Tevin's story exemplifies this predicament. The No Child Left Behind ("NCLB") public choice remedy is supposed to help alleviate disparities in educational opportunities by allowing students to transfer from poor-performing schools to better-performing schools.[8] Regrettably, however, very few students are able to utilize the NCLB public choice remedy largely as a result of a geographic restriction contained in the remedy, which only allow students to make *intra*-school district transfers rather than *inter*-school district transfers.[9]

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1. Kristina Torres, *Options Limited on 'No Child' Transfers in DeKalb*, ATLANTA J.-CONST., July 25, 2007, at B3.

2. *See* GA. DEP'T OF EDUC., NO CHILD LEFT BEHIND 2007 ADEQUATE YEARLY PROGRESS REPORT: TOWERS HIGH SCHOOL (2007), *available at* http://www.doe.k12.ga.us/ReportingFW.aspx? PageReq=103&SchoolId=5124&T=1&FY=2007 (reporting that 294 of the school's 307 students in 2007 were Black).

3. *Id.* (follow "School Profile" hyperlink; then follow "Facts" hyperlink).

4. *Id.* (follow "NCLB/AYP" hyperlink; then follow hyperlinks at left to move between years).

5. Torres, *supra* note 1.

6. *Id.*

7. *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955).

8. *See, e.g.*, 147 CONG. REC. E437 (daily ed. Mar. 22, 2001) (statement of Rep. Boehner) (stating that the NCLB public choice provision "will give students a chance, parents a choice, and schools a charge to be the best in the world").

9. *See* 20 U.S.C. § 6316(b)(1)(E)(i) (2006). The text of the statute reads in relevant part: "In the case of a school identified for school improvement under this paragraph, the local educational agency shall . . . provide all students enrolled in the school with the option to transfer to another public school served *by the local educational agency* . . . ." *Id.* (emphasis

The geographic restriction is significant because more often than not, poor-performing schools that are required to offer the public choice remedy are segregated by both race and class and are usually located within the same school district.[10] In contrast, better-performing schools that are eligible to receive transfers tend to have fewer minorities and socio-economically disadvantaged students but are also clustered within the same school district.[11]

That school quality is demarcated by school district boundary lines is no coincidence. Rather, it is a consequence of concerted policy decisions and laws. Local control over schools is a deeply rooted tradition in public education.[12] In furtherance of this ethos, school district boundary lines are drawn so that students for the most part attend schools in close proximity to where they live.[13] As a result, school district demographics mirror the racial and economic segregation that exists in residential neighborhoods.[14]

Despite the prominent role that school district boundary lines play in dictating educational opportunities for students, students are rarely given the chance to attend schools outside of the school

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added); *see also* Jennifer Jellison Holme & Amy Stuart Wells, *School Choice Beyond District Borders: Lessons for the Reauthorization of NCLB from Interdistrict Desegregation and Open Enrollment Plans*, *in* IMPROVING ON NO CHILD LEFT BEHIND 139, 143 (Richard D. Kahlenberg ed., 2008) (noting that since NCLB was implemented, fewer than 6% of students enrolled in schools in which the transfer option is offered have actually taken advantage of the opportunity to transfer to a better performing school).

10. *See, e.g.*, CYNTHIA G. BROWN, CHOOSING BETTER SCHOOLS: A REPORT ON STUDENT TRANSFERS UNDER THE NO CHILD LEFT BEHIND ACT 63 (Dianne M. Piché & William L. Taylor eds., 2004) (noting that "[i]n many urban school districts the number of schools in need of improvement is so large that there literally are not enough successful schools from which to choose").

11. *See generally* Erin Dillon, *Plotting School Choice: The Challenges of Crossing District Lines*, EDUC. SECTOR REP., Aug. 2008, *available at* http://www.educationsector.org/usr_doc/Interdistrict_Choice.pdf (advocating inter-district choice as a more effective means than intra-district choice at improving student performance).

12. Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . .").

13. Linking school attendance with residence purportedly furthers local control by allowing communities to tailor the education students receive to fit the needs of the community and allowing citizens to participate in formulating education policy. *See* KATHRYN A. MCDERMOTT, CONTROLLING PUBLIC EDUCATION: LOCALISM VERSUS EQUITY 16 (1999).

14. *See* CHARLES T. CLOTFELTER, AFTER *Brown*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 59 (2004) ("[M]any of the nation's large urban areas are checkered with dozens of separate school districts, and this balkanization is an important factor in the racial segregation of public schools."); *see also* AMY STUART WELLS ET AL., BOUNDARY CROSSING FOR DIVERSITY, EQUITY AND ACHIEVEMENT: INTER-DISTRICT SCHOOL DESEGREGATION AND EDUCATIONAL OPPORTUNITY 1 (2009), *available at* http://www.tc.columbia.edu/i/a/document/11666_Wells_Final_wBleeds.pdf ("[A] full 84% of racial/ethnic segregate on in U.S. public schools occurs *between* and not within school districts." (citing CLOTFELTER, *supra*)).

district that encompasses their residence.[15] The federal judiciary—the institution frequently looked upon to remedy issues of school segregation and inequality—has done little to nothing to remedy racial and economic segregation between school districts.[16] Instead, the federal judiciary, particularly the Supreme Court, has arguably *contributed* to the inter-district disparities by legitimizing the primacy of localism in its school equity jurisprudence.

Time and again, the federal judiciary has deferred to local school officials in their school financing schemes[17] and student assignment plans,[18] even when the decisions of these local officials have adverse impacts on educational opportunities for poor and minority students. Doctrinally, the result is that the federal judiciary is situated such that it cannot adequately address issues of racial and economic inequality in schools.

Several noted educational reformers have suggested amending the NCLB public choice provision to encourage inter-district transfers as a non-judicial means of combating increasing segregation and inequality between school districts.[19] This Article agrees with

15. While a number of states have enacted voluntary public choice programs which allow students to attend non-neighborhood schools, the majority of such choice programs still limit the choice programs to intra-district choice programs. Thus, similar to the NCLB public choice program, students are allowed to choose to attend schools within the same school district as their neighborhood school, but for the most part are not permitted to cross school district boundary lines. *See* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2064–65 (2002) (describing the forms that public school choice programs have taken and concluding that most public school choice programs involve intra-district choice).

16. *See, e.g.*, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 112 (2004) (arguing that over the last thirty years "the Supreme Court, and the lower federal courts, have done nothing to advance desegregation of schools or to equalize expenditures for education"); Kimberley Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1660–67, 1722–26 (2007) (discussing the federal judiciary's failure to implement effective school desegregation plans and arguing that a federal right to education be recognized through spending legislation that the federal and state governments collaboratively enforce).

17. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40–41 (1973) (upholding local property tax school funding schemes that result in gross disparities in per-pupil spending between school districts).

18. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974) (severely limiting the situations in which inter-district remedies can be used to remedy school segregation).

19. *See, e.g.*, BROWN, *supra* note 10, at 21 (recommending that the Department of Education revise the NCLB transfer provision to strongly encourage inter-district choice); Jonathan Kozol, *Transferring Up*, N.Y. TIMES, July 11, 2007, at A19 (suggesting that the NCLB public choice provision be revised to encourage intra-district transfers); Richard A. Kahlenberg, *Helping Children Move From Bad Schools to Good Ones*, THE CENTURY FOUND., 2 (June 15, 2006), http://tcf.org/publications/pdfs/pb571/kahlenbergsoa6-15-06.pdf (stating that the NCLB transfer provision "should be amended so that low-income students stuck in failing schools are able to transfer to high-quality, solidly middle-class public schools, sometimes in other districts, and so that these schools actually are encouraged to accept the transferring students").

the various calls to amend the public choice provision to better facilitate inter-district transfers.[20] It argues that the federal judiciary's commitment to localism in its school equity jurisprudence makes judicial remedies an ineffective conduit for achieving equalized educational opportunities for poor and minority students.

This Article proceeds in five parts. Part I provides a brief discussion of localism and the role that localism plays in limiting educational opportunities for poor and minority students. Part II analyzes key federal school desegregation and school finance decisions and contends that the federal judiciary's doctrinal preference for localism has crystallized racial and economic disparities between school districts. Part III offers a brief overview of what segregation in schools looks like today and argues that in order to combat increased segregation and inequality between school districts, a regionalist approach similar to the one used in interpreting portions of the Fair Housing Act ("FHA") is necessary. Part IV examines the role that NCLB plays in challenging the paradigm of localism in education and contends that NCLB could do more to alleviate the detrimental effects of localism if the statute's public choice provision were amended to better encourage inter-district choice. Part V concludes.

I. LOCALISM AND EDUCATION

Over the last three decades, metropolitan areas have experienced significant fragmentation and local government proliferation.[21] In most metropolitan areas, the fragmentation has been the result of the propagation of numerous political jurisdictions—usually suburbs located outside the core central city area that are typically afforded fiscal and regulatory autonomy separate from the core central city.[22] Significantly, this metropolitan fragmentation typically occurs along racial and economic lines—poor and minority citizens populate central cities while more middle

20. This Article deliberately eschews normative questions as to the pedagogical advantages and disadvantages of the standardized tests as a basis for measuring student progress and enforcing accountability. It instead focuses on the broader concept of the public choice remedy as a way of creating student mobility in order to combat principles of localism in education that have been detrimental to the educational opportunities of poor and minority students.

21. *See generally* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1123–44 (1996) (describing the nature of metropolitan fragmentation, the permeability of local legal boundary lines, and the problems with fairly and efficiently allocating public services and goods that result from metropolitan fragmentation).

22. *Id.* at 1136–38.

class and white citizens populate the suburbs.[23] The demographics of metropolitan fragmentation have serious implications for the provision of education in America. This is because school district lines are drawn such that school districts in the core central cities and suburbs reflect the racial and economic demography of their respective localities.[24] To the extent that educational opportunities and outcomes are influenced by race and class,[25] school district boundary lines therefore play a decisive role in determining the quality of education that a student will receive.

Against this backdrop, this Part examines the role that localism plays in the maintenance of school district boundary lines, despite the uneven educational opportunities that result from them. Section A provides an overview of localism and its theoretical underpinnings. Section B then examines and critiques localism in the education context.

A. Theoretical Justifications for Localism

Localism is broadly defined as a belief that decentralized, independent local government structures are preferable to a centralized government structure, particularly in metropolitan regions.[26] One of the central tenets of localism is that the provision of government services "ought to be controlled locally, with the interests of local residents as the exclusive desideratum of local decision

23. *See* Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 881–84 (2006) (discussing the effects of housing discrimination and urban sprawl and noting that the end result of both housing discrimination and urban sprawl is that low income individuals and minorities are relegated to inner-suburban and central-city housing while more affluent and middle-class whites tend to move to the outer-ring suburbs). It is important to note that while large numbers of minorities are increasingly moving from urban to suburban areas, they tend to be limited to certain communities. *See, e.g.*, *id.* at 880 ("[A]recent study of metropolitan Boston showed that nearly half of Black homebuyers were concentrated in only seven of 126 communities." (citing GUY STUART, SEGREGATION IN THE BOSTON METROPOLITAN AREA AT THE END OF THE 20TH CENTURY 5 (2000))).

24. *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 272–80 (1999) (explaining the relationship between residential segregation and the racial and economic demographics of urban school districts).

25. *See* john a. powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUS. & CMTY. DEV. L. 188, 198 (2003) ("[S]tudents educated in economically and racially segregated schools receive substandard educations. [And,] when a large number of students in a school face these challenges, the cumulative effect is that the ability of the school to provide a quality education is significantly impeded.").

26. *See* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1988 (2000) (defining localism as a preference for decentralized local governance structures).

makers."[27] Localism is often promoted within the scholarly literature on two grounds: (1) that it fosters democratic citizen participation and (2) that it results in an efficient allocation of public goods and services. This Section discusses each of these justifications in turn.

1. Citizen Participation

Proponents of localism suggest that a smaller local government with enhanced powers allows citizens to participate more meaningfully in their own governance.[28] For example, Professor Gerald Frug suggests that citizen participation is critical to the success of a democracy because it allows citizens to take responsibility for their own destiny in their daily lives.[29] He argues that localism, by encouraging citizen participation, increases the likelihood that citizen contributions will make a difference in the policy outcome and that the resulting policy solution will actually be an effective one for the locality because citizens who live in the locality will have helped shape the solution.[30] He further argues that meaningful citizen participation can only be cultivated through small levels of government because individuals are not

> likely to participate in the decisionmaking of an entity of any size unless that participation will make a difference in his life. Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so.[31]

On the other hand, when an individual's life is controlled by a distant centralized government with a hierarchical chain of

27. Richard Briffault, *Our Localism Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 444 (1990).

28. *See, e.g.*, JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 3–4 (1980) (arguing that what he terms "unitary democracies"—democracies in which parties come together and reach consensus instead of making decisions by a majority vote—meet the needs of people in ways that "adversary democracies" cannot); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1068–73 (1980) (noting that the development of the modern Western city is often critiqued on the grounds that it limits the ability of individuals to control their own lives and arguing that reducing the scale of political decision-making is one of the most effective ways to allow people to regain some control over their own lives).

29. *See* Frug, *supra* note 28, at 1068–69.

30. *See id.*

31. *Id.* at 1070.

command, the individual is likely to feel powerless and decline to participate in political decision-making.[32]

2. Efficiency

The second argument most often advanced in support of localism is that it will result in the efficient provision of public goods and services. Professor Charles Tiebout hypothesized that decentralization of power to several local governments will create market-like competition among local governments for citizens.[33] According to Tiebout's hypothesis, each local government would offer a mix of public goods and services in an effort to attract citizens.[34] Citizens would then "vote with their feet" and gravitate to the community that offered their desired mix of public goods and service.[35] For example, people who desire a high quality of a certain public good would move to communities with high levels of that particular public good and be willing to pay high taxes to pay for the public good.[36] By contrast, individuals with low demands for quality public goods would choose other communities with low levels of public services and low taxes.[37]

B. A Critique of Citizen Participation and Efficiency Justifications for Localism in the Education Context

In the education context, local control over schools is often justified on the same grounds as the broader localism doctrine: citizen participation and efficiency. With respect to citizen participation, one of the primary philosophical arguments for local control over schools is that it fosters democratic participation by allowing citizens to participate in decision-making.[38] More specifically, proponents of local control contend that the governing bodies of the school districts (i.e., school boards) will be in close

32. *Id.*

33. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–18 (1956).

34. *Id.* at 417.

35. *See id.*

36. *See id.* at 418.

37. *See id.*

38. These justifications have been advanced by lawmakers, courts, and scholars alike. *See, e.g.*, Owens v. Colo. Cong. of Parents, Teachers and Students, 92 P.3d 933, 941 (Colo. 2004) (striking down a school voucher program on the grounds that it violated a state constitutional requirement for local control over public school instruction).

proximity to the people and therefore the people will have an opportunity to easily influence education policy.[39]

In reality, however, citizen participation in local board of education decision-making is often very limited.[40] Citizen attendance at board meetings and voter turnout for board of education elections are traditionally low in both affluent and non-affluent school districts.[41] Moreover, even when citizens do attempt to participate in board meetings, many board meetings are structured such that the opportunity for public discussion is limited and any public discussion that does occur typically does not relate to or influence board decisions.[42] Most importantly, citizen participation is rendered meaningless if a locality lacks the financial or political resources to translate citizen participation into actual policy that meets citizen needs and desires.[43] In poorer school districts where residents do not have the means or the political clout to influence school board policy, citizen participation is not likely to make a significant difference.[44] Thus, the citizen participation justification for localism in education simply does not bear out. Citizens do not actually participate in large numbers at the board of education level, and in some instances, even if they do, their participation is ineffective.

The Tieboutian efficiency justification for local control of schools is also flawed. Localism in education is often defended on the ground that diverse schools and school districts provide citizens the option of "shopping" around and locating themselves in school districts that meet the preferred educational needs of their

39. *See* Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 519–520 (2010) (arguing that local control allows for parental involvement and makes public schools and school districts "more likely to be genuine 'functional communities' than other local polities" (footnote omitted)). *But see* MCDERMOTT, *supra* note 13, at 53.

40. MCDERMOTT, *supra* note 13, at 54–60 (describing the limited nature of public participation in school governance and concluding that the general public for the most part is not attentive to the activities of local boards of education and do not participate in boards' decision making processes).

41. *See, e.g.*, *id.* at 55 (reporting the findings of a study that showed that voter turnout in Stanton, Connecticut was substantially similar to three other towns); *see also* HARVEY J. TUCKER & L. HARMON ZEIGLER, PROFESSIONAL VERSUS THE PUBLIC: ATTITUDES, COMMUNICATION, AND RESPONSE IN SCHOOL DISTRICTS 229 (1980) (finding that a "small minority of citizens vote on school district elections and attend public meetings").

42. *See, e.g.*, MCDERMOTT, *supra* note 13, at 60–67 (studying the structure of board of education meetings in various communities in Connecticut and concluding that most of the deliberations on substantive education policy issues occurs in special meetings, leaving larger meetings open to the public largely for ceremonial functions). Most of the people who attended and commented at meetings open to the public were school principals or other school district employees; the public comments made at the meetings rarely related to the items actually on the board agendas. *Id.*

43. *See* Cashin, *supra* note 26, at 2045–46.

44. *See id.*

children.[45] However, the model erroneously assumes unlimited citizen mobility. In the education context, the model assumes that citcitizens will move to a school district that provides them with the optimal level and quality of education for their children. While it is indeed true that for some families residential choice is informed by the quality of the neighborhood schools, residential mobility is only an option for a limited number of families.[46] Instead, because home prices in residential areas with high-quality schools are often expensive, parents dissatisfied with their children's schools more often than not "vote with their feet" by attempting to change schools rather than changing residences.[47] This is particularly true for less affluent parents who lack the financial means to move into better residential areas with better schools.

Furthermore, while parents should undoubtedly have some say in the quality of education that their children receive, the notion that parental "preference" or "choice" should be a guiding principle for strict local control of schools is inappropriate because education bears more resemblance to a public rather than a private good.[48] Put another way, since state governments have the responsibility under most state constitutions to provide public education, parents should not have the 'choice' to provide their children with an adequate or inadequate education.

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45. *See* Jack Buckley & Mark Schneider, *School Choice, Parental Information, and Tiebout Sorting: Evidence from Washington, DC, in* THE TIEBOUT MODEL AT FIFTY 101, 103–104 (William A. Fischel ed., 2006) (finding that households expend more time and resources shopping for education than other services); *cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–50 (1972) ("[L]ocal control means . . . the freedom to devote more money to the education of one's children."); Tiebout, *supra* note 33, at 418 (explaining that people choose communities in which to live based on which local government best satisfies his or her preferences).

46. *See* Buckley & Schneider, *supra* note 45, at 104 ("[A]lmost one-quarter of parents in the nation report that they moved to their current neighborhood so that their child can enroll in the local school and this proportion increases with parents' level of educational attainment.").

47. *Id.* at 104–05 (noting the results of a survey of parents in Washington, D.C. and stating that while many parents considered moving their residence as a means to improve their school choices, the most common forms of exercising choice were to try and get their children into a charter school or to try to exercise intra-district choice).

48. *See* MCDERMOTT, *supra* note 13, at 21 (acknowledging that education has dual characteristics of both a private good and a public good, but arguing that education is predominately a public good because "[p]ublic goods are characterized by economies of joint supply and nonexcludability," and that public education fits the description of a public good because "[w]hen individuals learn, the effects of that learning accrue not only to them but also to society as a whole by contributing to a well-trained workforce and an educated citizenry").

The benefits and costs of maintaining an educated populace accrue to society as a whole.[49] The fact that most states require a minimum level of education and tax their citizens to ensure free public education demonstrates[50] that there is indeed a collective interest in maintaining a well-educated populace. Yet the Tieboutian efficiency justification for localism treats public education as if it were a private good rather than a public good insofar as it allows market-like principles to control the distribution of educational resources. In reality, market failure is all too common: for poor and minority residents unable to relocate to more privileged communities with higher-quality schools, there is no Tieboutian choice.

To be fair, local control of schools has some benefits, namely the logistical ease of governance and the flexibility to respond to communities' needs and preferences.[51] However, local control also has an exclusionary side insofar as it creates inequitable distribution of educational resources along geographic lines, which are segregated by both race and class. Neither citizen participation nor efficiency justifies adhering to localism in education. Instead, these purported justifications perpetuate pervasive falsities about the racial inequalities that now exist between schools and school districts throughout the country. As discussed *infra* in Part IV, the local control paradigm should be reconsidered in order to allow for a more inclusive and just distribution of educational resources.

II. THE FEDERAL JUDICIARY'S AFFIRMATION OF LOCALISM IN SCHOOL DESEGREGATION AND SCHOOL FINANCE CASES

As discussed above, localism has long been accepted as the preferred model of education in America, even as its deleterious effect on poor and minority communities has become better understood. Not only has localism in education been accepted as a matter of policy, but it has also been vigorously defended by the Supreme

49. *See* STEPHEN J. CARROLL & EMRE ERKUT, THE BENEFITS TO TAXPAYERS FROM INCREASES IN STUDENTS' EDUCATIONAL ATTAINMENT, at xvi (2009), *available at* http://www.rand.org/pubs/monographs/2009/RAND_MG686.sum.pdf (finding that an increase in educational attainment increases both the likelihood of employment and wages, when employed, for an individual, and reduces the likelihood that the individual will participate in social support programs).

50. *See* Thomas Kleven, *Federalizing Public Education*, 55 VILL. L. REV. 369, 392 (2010) (noting that most states' constitutions obligate states to provide free public education); *Compulsory School Age Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/print/educ/CompulsorySchAgeChart.pdf (last updated Feb. 2006).

51. *See, e.g.*, Saiger, *supra* note 39, at 518–25 (describing the benefits of localism in education and noting the important role it plays in inculcating community values to children).

Court in its school desegregation and school finance jurisprudence.

A. The School Desegregation Cases: A Localist Beginning

Since its 1955 decision in *Brown v. Board of Education* ("*Brown II*"),[52] the Supreme Court has consistently expressed a doctrinal preference for principles of localism at the expense of the constitutional rights of minority and poor students. The Court's reasoning in *Brown II* is particularly instructive. There, the Court was faced with the question of the appropriate remedy to impose in order to correct the constitutional violation found in the 1954 *Brown v. Board of Education* ("*Brown I*")[53] decision. The Court declined to grant the immediate injunctive relief requested by the plaintiffs and instead remanded the cases back to the local district courts to formulate remedies, reasoning that the formulation of remedies would require solutions of "varied local . . . problems" and "the elimination of a variety of obstacles."[54]

The "local school problems" and "obstacles" referenced by the Court were undoubtedly the local customs or policies that subjugated minorities, particularly Black citizens. These local customs were so deeply ingrained in some communities that various state attorneys general advocated for gradual rather than immediate relief because of the threat of white mob violence if schools were integrated.[55] By ordering gradual rather than immediate relief, the Court allowed local school districts to set the tone as to the pace and scope of school desegregation efforts. In turn, many Southern states seized upon *Brown II* as a license to stall desegregation efforts

52. 349 U.S. 294 (1955).

53. 347 U.S. 483 (1954) (holding that the segregation of races in public schools constituted a denial of equal protection).

54. *Brown II*, 349 U.S. at 299–300.

55. *See, e.g.*, Brief for the Attorney General of Florida as Amicus Curiae at 108–09, *Brown II*, 349 U.S. 294 (1954), 1954 WL 45715 (noting that the majority of whites disfavored the desegregating schools and that "there is a minority of whites who would actively and violently resist desegregation, especially immediate desegregation"); Brief for Harry McMullan, Attorney General of North Carolina, as Amicus Curiae at 37, *Brown II*, 349 U.S. 294 (1954), 1954 WL 45720 (arguing that the immediate desegregation of schools would likely lead to "[c]onflicts in the schoolroom, on the playground, and between parents and teachers [which] may lead to racial bitterness in a community and bring to North Carolina the bloody race riots which have disgraced cities and states"); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 253–54 (1962) (noting the Court's desire to issue an opinion in *Brown II* that would reduce opposition and promote flexibility and tolerance among whites).

or to not desegregate at all.[56] As a result, very little desegregation occurred in the years immediately following *Brown II*. Four years after the decision, only 0.15% of Black children in the South were attending desegregated schools, and nine years out, only 1.2% were in desegregated schools.[57] In fact, meaningful school desegregation did not occur until the mid-1960s when the Supreme Court began eschewing principles of localism and requiring schools to take affirmative steps to dismantle segregated school systems.[58] In 1971, the Court went even further, holding in *Swann v. Charlotte-Mecklenburg Board of Education* that federal courts have broad authority when exercising their equitable remedial authority to formulate remedies in desegregation cases, including the authority to order busing and to implement racial ratios.[59]

B. Normalization of Localism: San Antonio v. Rodriguez *and* Milliken v. Bradley

The Court's aggressive interventionist approach toward school desegregation was short-lived. Immediately after *Swann*, demonstrations broke out and "white flight" out of cities into suburbs in-increased.[60] In part because of this unexpected backlash, the Court went on to significantly constrict its interpretation of the scope of the Fourteenth Amendment in later school equity cases involving issues of school finance and school desegregation. As discussed below, *San Antonio Independent School District v. Rodriquez*[61] and *Milliken v. Bradley*[62] are two cases that exemplify the Court's retreat

56. *See, e.g.*, Green v. Cnty. Sch. Bd., 391 U.S. 430, 441–42 (1968) (finding "freedom of choice" plan unconstitutional where small number of students chose to attend school in which their race was in the minority and plan burdened students and parents with the responsibility of desegregating); Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 229–32 (1964) (holding that the closing of schools as a means to thwart desegregation efforts was unconstitutional); McNeese v. Bd. of Educ., 373 U.S. 668, 674–76 (1963) (stating that Black children could not be precluded from enrolling in nonsegregated schools for failing to exhaust State administrative remedies); Cooper v. Aaron, 358 U.S. 1, 18–20 (1958) (rejecting the Board of Education's request to postpone desegregation efforts due to extreme public hostility).

57. *See* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994).

58. *See, e.g., Green*, 391 U.S. at 437–38 (holding that schools have an affirmative duty to eliminate segregated school systems "root and branch"); *Griffin*, 377 U.S. at 232 (requiring schools to "quick[ly] and effective[ly]" eliminate vestiges of segregation in schools).

59. 402 U.S. 1, 15–18, 22–27 (1971). Though it should be noted that the Court characterizes the use of racial ratios as limited to "no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." *Id.* at 25.

60. GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 10–18 (1996).

61. 411 U.S. 1 (1973).

62. 418 U.S. 717 (1974).

from aggressive intervention and its subsequent embrace of localism principles.

1. *San Antonio v. Rodriguez*

In *San Antonio v. Rodriguez*, the Court decided the constitutionality of the State of Texas' school financing system. Under the Texas school financing system, school districts received a portion of their funding from the State and the remainder of their funding from property taxes collected on properties within the school district.[63] The plaintiffs, a class of Mexican-American parents from an urban school district in San Antonio, argued that the financing system resulted in substantial disparities in per-pupil expenditures between school districts due to substantial differences in the value of assessable property among the school districts.[64] The plaintiffs argued that because the Texas school financing system resulted in inter-district disparities in per-pupil spending, the financing system violated their equal protection rights because it discriminated based upon wealth.[65] The plaintiffs further argued that the discriminatory financing system violated the Fourteenth Amendment because it interfered with their "fundamental right" to an education.[66] The Supreme Court disagreed, finding that the Texas school "financing system [did not] discriminate[] against any definable category of 'poor' people [nor did it] result[] in the absolute deprivation of education" for any class of people.[67] The Court did not find a fundamental right to education.[68] Analyzing the constitutionality of the Texas school finance system under a rational basis test rather than applying strict scrutiny, the Court found the school financing scheme constitutional, despite the stark inter-district disparities in per-pupil spending.[69]

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63. *Rodriguez*, 411 U.S. at 6–9.

64. *Id.* at 11–13. The plaintiffs compared the amount per-pupil expended by Edgewood Independent School District, which contained schools located in a residential area with little commercial or industrial property and residential property occupied by predominately poor Mexican-American residents, with the Alamo Heights Independent School District, which contained schools located in a highly residential area occupied by predominately upper-middle class white residents. The Court noted that due to the value of the assessable property in the respective school districts, the Edgewood Independent School District was only able to spend $356.00 per pupil while the Alamo Heights Independent School District was able to spend $594.00 per pupil. *Id.*

65. *Id.* at 15–16.

66. *Id.* at 29.

67. *Id.* at 25.

68. *Id.* at 35.

69. *Id.* at 54–55.

In concluding that the Texas school financing system did not violate the plaintiffs' equal protection rights nor impinge upon a fundamental right, the Court invoked Frugian and Tieboutian notions about how local control over education would cultivate citizen participation and foster competition for educational excellence. The majority opinion suggests:

> [L]ocal control means . . . the freedom to devote more money to the education of one's children. Equally important, however, is the *opportunity it offers for participation in the decisionmaking process* that determines how those local tax dollars will be spent. *Each locality is free to tailor local programs to local needs.* Pluralism also affords some opportunity for experimentation, innovation, and a *healthy competition for educational excellence.*[70]

Rodriguez represented a significant retreat from the Court's interventionist approach in cases like *Swann*. Instead, as Justice Marshall noted in his lengthy dissent, the Court was content to favor localized education over the ability of poor and minority children to obtain equal educational opportunities.[71] The Frugian and Tieboutian language in *Rodriguez* ignores the reality that school districts with poorer tax bases will not be able to effectively "tailor [school] programs to local needs," because the poorer districts do not have the money to do so. Similarly, the idea that "local control" results in "competition for educational excellence" suffers from the same fallacies that discredit Tiebout's justification for localism broadly: because poorer localities lack the fiscal capacity to compete, the only competition that will occur is between more affluent localities or school districts. These realities have become abundantly clear several years after the *Rodriguez* decision.

2. *Milliken v. Bradley*

Two years after *Rodriguez*, the Court decided *Milliken v. Bradley*,[72] a case involving the constitutionality of an inter-jurisdictional school desegregation plan between an urban and suburban school district in the Detroit metropolitan area. *Milliken* arose at a time in the 1970s when white flight to the suburbs became an increasing barrier to formulating effective school desegregation plans,

70. *Id.* (emphasis added).
71. *Id.* at 84–85, 126 (Marshall, J., dissenting).
72. 418 U.S. 717 (1974).

particularly in the northern parts of the country.[73] As a result of white flight, many urban school districts had too few white students to implement meaningful desegregation plans. The Detroit metropolitan area exemplified this problem: African-Americans predominantly inhabited the city while whites populated the surrounding suburbs in greater number.[74] The plaintiffs in *Milliken* alleged that the City of Detroit's school system was segregated due to the *de jure* practice of state officials.[75] The District Court and the Sixth Circuit Court of Appeals approved a school desegregation plan encompassing the City of Detroit and adjacent suburban school districts.[76] Both courts acknowledged that given the racial makeup of the City and suburban schools, "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems."[77] Both courts also reasoned that formulating an inter-district school desegregation plan was within the equitable remedial authority of the federal district court because the City of Detroit's *de jure* school segregation practices were attributable to the State and the "State controls the [school district] whose action is necessary to remedy the harmful effects of the State acts."[78]

The Supreme Court disagreed and instead held the inter-district school desegregation plan unconstitutional. The Court reasoned that the suburban school districts were autonomous entities separate from the City of Detroit school district.[79] Before an inter-district remedy could be ordered, the Court found that the plaintiffs would first need to show that the suburban school districts engaged in *de jure* segregative practices that produced a significant segregative effect in the City of Detroit school district.[80] The Court concluded that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[81]

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73. An in-depth discussion of the causes and consequence of white flight is beyond the scope of the Article. For a more thorough discussion of white flight during the 1970s and the implications for school desegregation, see ORFIELD & EATON, *supra* note 60, at 10–18.

74. *Milliken*, 418 U.S. at 725, 739.

75. *Id.* at 723–24.

76. *Id.* at 725–35.

77. *Id.* at 735 (quoting *Bradley v. Milliken*, 484 F.2d 215, 245 (6th Cir. 1973) (en banc)) (internal quotation marks omitted).

78. *Id.* at 736 (quoting *Milliken*, 484 F.2d at 249) (internal quotation marks omitted).

79. *Id.* at 744–45.

80. *Id.*

81. *Id.* at 745.

The standard articulated in *Milliken* invalidates any inter-district school desegregation plan unless there is proof of an inter-district violation—a very difficult standard that plaintiffs in only a handful of cases have been able to meet.[82] *Milliken* has been a devastating setback for school desegregation efforts. By making an inter-district violation a constitutional requirement for the implementation of an inter-district remedy, the Court treated school district boundary lines as sacrosanct rather than the administrative creations of the state that they actually are.[83] Indeed, the Court recognized the administrative mutability of school district boundary lines in earlier cases.[84] Similar to the Court's embrace of local control in *Rodriguez*, the Court in *Milliken* favored local control—in this instance, local control of school district boundary lines—at the expense of implementing a meaningful school desegregation plan to remedy a constitutional violation. The Court bristled at the suggestion that school district boundary lines should be disturbed in order to remedy *de jure* segregation; the Court noted:

> Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district [boundary] lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local

82. *See, e.g.*, United States v. Bd. of Sch. Comm'r, 456 F. Supp. 183, 191–92 (S.D. Ind. 1978) (finding that inter-district desegregation order was warranted due to housing discrimination), *aff'd in part, rev'd in part, vacated in part*, 637 F.2d 1101 (7th Cir. 1980), *and cert. denied*, Metro. Sch. Dist. v. Buckley, 449 U.S. 838 (1980); Evans v. Buchanan, 416 F. Supp. 328, 352–53 (D. Del. 1976) (approving inter-district desegregation remedy due to government manipulation of enrollment patterns); *see also* Hills v. Gautreaux, 425 U.S. 284, 305–06 (1976) (ordering inter-district remedy in housing discrimination case).

83. *See, e.g.*, Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Calculation*, 58 GEO. WASH. L. REV. 1105, 1134 (1990) (noting that the majority in *Milliken* erred by not finding that "the Detroit Board of Education was an agency of the state of Michigan" and that the Board's "acts of racial discrimination could be considered those of the state of Michigan for purposes of the Fourteenth Amendment"); Mark C. Rahdert, *Obstacles and Wrong Turns on the Road from* Brown*:* Milliken v. Bradley *and the Quest for Racial Diversity in Education*, 13 TEMP. POL. & CIV. RTS. L. REV. 785, 798 (2004) (arguing that the *Milliken* majority wrongly characterized the local school districts and the State of Michigan as if they were constitutionally distinct entities and noting that "[i]t is elementary that in our constitutional structure cities and local school boards derive their authority from the state").

84. *See, e.g.*, Sailors v. Bd. of Educ., 387 U.S. 105, 108 (1967) (characterizing general local governments as "convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them, and the number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rest[ing] in the absolute discretion of the State" (internal quotation marks omitted) (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907))).

> control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the education process.[85]

Milliken elevated the status of school district boundary lines in the name of "local control." In so doing, the case changed the doctrinal landscape of the Court's school desegregation jurisprudence. Given the realities of segregation in residential housing, there simply are not enough white students in urban school districts nor are there enough minority students in suburban school districts to achieve meaningful desegregation. *Milliken* also arguably encourages whites seeking to avoid integrated education to move to the suburbs. As noted by other scholars, if *Milliken* had come out differently, a major incentive for moving to the suburbs would have been eliminated.[86] In sum, *Milliken* poses a nearly insurmountable barrier to effective desegregation insofar as it effectively immunizes suburban school districts from scrutiny under the Fourteenth Amendment and encourages whites seeking to avoid integrated education to move to the suburbs.

D. After Rodriguez *and* Milliken*: Localism as a Near Constitutional Norm*

Rodriguez and *Milliken* ushered in a new era in the Court's analysis of the scope of the Fourteenth Amendment in school desegregation cases. Together, the cases elevated localism in education to a near constitutional norm. For example, a trio of cases in the 1990s tested the stability of the norm, and all came out reaffirming it.[87] In each case, the Court wrestled with the standard under which school districts that were subject to school desegregation decrees could be considered to have achieved "unitary" status[88] and therefore released from federal court supervision.[89] For the

85. *Milliken*, 411 U.S. at 741–42.

86. *See* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education*, 81 N.C. L. REV. 1598, 1605–09 (2003) (discussing the move of white families to suburban areas and the resulting segregation of public schools).

87. Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

88. *See Freeman*, 503 U.S. 467. The term "unitary status" means that the school district has eliminated the old racially segregated dual school system. Seven factors are measured to determine if a school district has achieved unitary status. These factors are: extracurricular activities; transportation; administrative staff assignment; relative quality of education; faculty assignment and student assignment.

89. *See Jenkins*, 515 U.S. 70; *Freeman*, 503 U.S. 467; *Dowell*, 498 U.S. 237.

most part, the Supreme Court opted to impose broad and arguably vague standards that afforded school districts the opportunity to terminate school desegregation decrees, even though termination of the decrees would return these school districts to hyper-segregated conditions. For example, in *Board of Education v. Dowell*, the Court held that a school district need only show that it "complied in good faith with the desegregation decree since it was entered" and that "the vestiges of past discrimination have been eliminated to the extent practicable"[90] in order to be released from a federal court school desegregation decree. Prior to the Court's ruling in *Dowell*, school districts might not be released from school desegregation decrees if releasing them would have the foreseeable impact of restoring segregated conditions within a school district.[91] After *Dowell*, however, school districts could free themselves from federal court supervision so long as they made a good faith effort "to the extent practicable" to eliminate vestiges of discrimination, even if releasing the school districts would result in foreseeable segregation.

In *Freeman v. Pitts*, the Court further weakened the strength of federal court control over school desegregation by finding that federal district courts have the authority to release school districts from school desegregation decrees in incremental stages, before the school district has achieved unitary status or eliminated vestiges of segregation in all areas of school operations.[92] Finally, in *Missouri v. Jenkins*, the Court ordered an end to successful court-ordered desegregation plans once unitary school systems were achieved, even if termination of the court-ordered school desegregation plans would return the schools to extreme levels of segregation.[93]

Notably, in *Dowell*, *Freeman*, and *Jenkins*, the Court emphasized that principles of federalism necessitated that federal supervision of local schools be a temporary measure and that local control of schools be returned as soon as possible.[94] The Court further emphasized that school districts were not responsible for remedying

90. *Dowell*, 498 U.S. at 249–50.

91. *See* Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 794–95 (2000) (noting Supreme Court cases prior to *Dowell* holding that proof of foreseeable segregative consequences of state action is relevant to demonstrating a racially discriminatory purpose and authorities' failure to eradicate prior discrimination).

92. *See Freeman*, 503 U.S. at 492–93.

93. *See Jenkins*, 515 U.S. 70.

94. *See id.* at 102 (emphasizing that the goal of desegregation remedies is to "'remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution'" (quoting *Freeman*, 503 U.S. at 489)); *Dowell*, 498 U.S. at 247 ("[F]ederal supervision of local school systems was intended as a temporary measure to remedy past discrimination.").

racial imbalance attributable to factors outside of the school district's control, such as demographic change and parental school preference.[95] Because the Court has so freely embraced localism, defendant school districts have enjoyed significant latitude to exercise control over the school desegregation remedial process.[96] Indeed, since the Court's decisions in *Dowell*, *Freeman*, and *Jenkins*, school districts have been released from school desegregation decrees in overwhelming numbers and more often than not win challenges to segregated school conditions brought by minority parents and students.[97]

There are two noteworthy implications of the Court ceding such control to defendant school districts in the name of local control. First, from a constitutional perspective, the Fourteenth Amendment *Brown I* right of minority children to attend non-segregated schools has arguably been subjugated to the American value preference for "local control" over schools. By insisting that federal court supervision over school desegregation plans was always intended to be a temporal measure and further insisting that school districts are not to be held accountable for factors beyond their control such as demographic changes, the Court forecloses the possibility of any effective judicially created remedy for school segregation. Second, by imposing a minimal "good faith" requirement on school districts to "remedy vestiges of discrimination to the extent practicable"[98] in order to escape federal court supervision, the Court implicitly provides safe harbor for school districts to avoid continued participation in school desegregation plans.

III. MODERN DAY SCHOOL SEGREGATION: GEOGRAPHY, RACE, AND CLASS

The consequences of the federal judiciary's preference for localism in its school equity jurisprudence cannot be overstated. Because students for the most part attend schools in close proximi-

95. *See, e.g.*, *Jenkins*, 515 U.S. at 117 (Thomas, J., concurring) ("District courts must not confuse the consequences of *de jure* segregation with the results of larger social forces .... 'It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation.'" (quoting *Freeman*, 503 U.S. at 496)).

96. *See* Wendy Parker, *Connecting the Dots:* Grutter, *School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1731–39 (2004) (arguing that defendants are afforded too much deference and control over the school desegregation remedial process in the name of local control).

97. *See* Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1629–34 (2003).

98. *Dowell*, 498 U.S. at 249–50.

ty to the neighborhoods in which they live, the true ramifications of the Court's embrace of localism can only be understood within the larger context of residential housing segregation and the federal, state, and local laws that perpetuate such segregation.

A. Segregation by Geography: Segregated Neighborhoods and Segregated Schools

One important factor that differentiates school segregation today from school segregation pre-*Brown* is geography. Today, inequalities in education mirror the stark inequalities between urban and suburban schools. Schools in urban cities and inner-ring suburbs typically lag far behind their suburban counterparts in measures of academic achievement and traditionally boast fewer teaching resources.[99] The academic achievement and resource gap between urban and suburban schools is neither accidental nor coincidental. Rather, as discussed further in Part III.B *infra*, it is the result of state and local government laws that encourage affluent and typically white residents to migrate away from poor and typically minority residents.

The long and sordid history of residential segregation has been discussed at great length by other scholars and need not be recounted in great detail here.[100] Nevertheless, it is worth briefly describing how intense residential segregation in metropolitan areas leads to segregation in schools.

Residential segregation typically tracks the boundary lines between cities and suburbs. According to the 2000 U.S. Census Bureau report, approximately 77% of individuals who lived in a metropolitan suburb were white while only 23% belonged to a minority group.[101] Residential segregation then replicates itself in schools because school district boundary lines are typically drawn

99. *See, e.g.*, MARGARET C. WANG & JOHN A. KOVACH, BRIDGING THE ACHIEVEMENT GAP IN URBAN SCHOOLS: REDUCING EDUCATIONAL SEGREGATION AND ADVANCING RESILIENCE-PROMISING STRATEGIES 3–4 (1995) (describing one of the side effects of residential segregation being that African-American and other minority students get segregated in schools where academic achievement is low and resources such as qualified teachers and textbooks are nonexistent).

100. *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 130–42 (1993) (arguing that residential segregation is the principal factor responsible for the creation of the urban underclass).

101. *See* 2000 CENSUS OF POPULATION AND HOUSING, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS (2001), *available at* http://www.census.gov/prod/cen2000/dp1/2khus.pdf (noting that of the minority population in the suburbs 8% are Black, 11% Latino, and 3% Asian).

coterminous with political subdivisions. Demographic enrollment data from the 2006–2007 school-year bears this out:

TABLE 1
DISTRIBUTION OF ENROLLMENT BY SCHOOL DISTRICT LOCATION
(% SHARE OF SUBURBAN ENROLLMENT)[102]

	White	Black	Latino	Asian
Suburban Enrollment	59%	15%	20%	6%

TABLE 2
DISTRIBUTION OF ENROLLMENT BY SCHOOL DISTRICT LOCATION
(% SHARE CHILDREN EDUCATED BY URBAN SCHOOLS BY RACE)[103]

	White	Black	Latino	Asian
Urban Enrollment	19%	48%	47%	47%

As predicted by residential housing patterns, Table 1 shows that white students make up the majority (59%) of students enrolled in suburban schools while Black, Latino, and Asian students make up a much smaller percentage. In contrast, Table 2 shows that only 19% of all white students are enrolled in urban schools while nearly half of all Black, Latino, or Asian students (48%, 47%, and 47% respectively) are enrolled in urban schools. These statistics are troubling. Because urban schools usually have inferior resources and score lower on academic achievement levels,[104] the segregation of white students into suburban schools and minority students into urban schools runs counter to *Brown*'s promise of equal educational opportunity for all students, regardless of race.

B. Racial and Economic Segregation in Schools: Why It Matters

Schools with high concentrations of poor students also enroll a high percentage of minority students. For example, during the 2005–2006 school-year, the average Black or Latino student attend-

102. RICHARD FRY, PEW HISPANIC CENTER, THE RAPID GROWTH AND CHANGING COMPLEXION OF SUBURBAN PUBLIC SCHOOLS 3 (2009), *available at* http://pewhispanic.org/files/reports/105.pdf.

103. *Id.* at 4.

104. *See* Section III.B *infra*.

ed a school in which 59% of his or her peers was classified as "poor" while only 31% of the average white student's peers was classified as poor.[105] In addition, school districts with large percentages of students classified as "extremely poor"[106] also have a disproportionately high percentage of Black and Latino students.[107] Thus, schools that are segregated by race are also typically segregated by poverty as well.

The combination of racial and economic segregation in schools presents a series of significant barriers to providing students with a high-quality education. First, poor students often face significant challenges in their home environments: poor health, malnutrition, neighborhood violence, and unstable family situations, which can all serve as serious impediments to student attendance and learning.[108] As a result, they are more likely to miss out on the various informal education and socialization opportunities that researchers have identified as just as important to making students "school ready."[109] Poor minority students also often face pressure from their peers to *not* succeed academically because achievement is otherwise equated with "acting white."[110]

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105. *See* GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 19 (2007), *available at* http://www.eric.ed.gov/PDFS/ED500611.pdf. The report defines "poor" as students qualifying for free or reduced lunch under federal poverty guidelines. *Id.* at 20.

106. *See* STEVE SUITTS, THE WORST OF TIMES: CHILDREN IN EXTREME POVERTY IN THE SOUTH AND THE NATION 15 (2010), *available at* http://www.southerneducation.org/pdf/TWOT-Extreme%20Child%20Poverty%20Rpt-Final.pdf (defining "extremely poor" as a family that subsists on half the amount of the federal poverty line or approximately $11,000 a year for a family of four).

107. *Id.* ("African American (43.4 percent) and Hispanic (34.4 percent) students make up 78 percent of the total enrollment of the 100 school districts in the United States with the highest levels of extremely poor children—districts where at least two children out of every 10 live in extreme poverty.").

108. *See* Abbott v. Burke, 693 A.2d 417, 433 (N.J. 1997) (finding that in poor, predominately minority schools, "obstacles to a thorough and efficient education are present not only in the schools themselves, but also in the neighborhoods and family conditions of poor urban children . . . [including] drug abuse, crime, hunger, poor health, illness, and unstable family situations"); GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 15 (2005), *available at* http://bsdweb.bsdvt.org/district/EquityExcellence/Research/Why_Segreg_Matters.pdf (finding that poor communities "reflect conditions of distress—housing inadequacy and decay, weak and failing infrastructure, and critical lack of mentors and shortage of jobs—all of which adversely affect inner city children's educational success").

109. *See, e.g.*, SUITTS, *supra* note 106, at 18–19 (noting that "poor children hear and learn on average about one-third to one-half the number of spoken English words that non-poor children learn simply through exposure in their early years" which contributes to them being less ready to begin school than non-poor students).

110. Signithia Fordham & John U. Ogbu, *Black Students' School Success: Coping with the "Burden of 'Acting White,'"* 18 URB. REV. 176, 181 (1986).

Given the myriad of obstacles faced by schools with high percentages of socio-economically disadvantaged and minority students, one would think that these schools must spend a premium to compensate by providing additional academic and non-academic support programs.[111] However, these schools typically spend significantly less money per-pupil than school districts with lower poverty rates, even when one accounts for federal grant money given to schools with large percentages of poor students.[112] Consequently, they are more likely to have teachers who are not credentialed in the subject areas in which they teach, offer fewer honors or advanced placement courses, and have high teacher turnover rates.[113] Predictably, students who attend such schools score lower on standardized achievement tests and are more likely to drop out.[114]

Simply put, a significant number of students who attend predominantly poor and minority schools receive lesser access to adequate educational resources and have lower academic achievement than their white and more affluent peers. The U.S. school age population is becoming increasingly racially diverse and is projected to be nearly 40% Black, Latino, or Asian-American by 2030.[115] If the growing number of minority students, particularly Black and Latino students, do not receive access to adequate educational resources and improved academic achievement, the United States could see a significant decrease in the wage earning potential of its citizens along with a loss of significant tax reve-

111. *See, e.g.*, Ryan, *supra* note 24, at 285 (concluding that "schools with large concentrations of impoverished students will face the greatest educational costs, even before factoring in such additional services as security or counseling, and even without considering the different prices for educational goods and services in cities as opposed to suburbs or rural areas").

112. *See* SUITTS, *supra* note 106, at 16; Cassandra Jones Havard, *Funny Money: How Federal Education Funding Hurts Poor and Minority Students*, 19 TEMP. POL. & CIV. RTS. L. REV. 123 (2009) (arguing that the Title I federal funding regime has become a source of inequity in educational services for students in high-poverty schools because it allows for discretion in the allocation of federal monies).

113. *See* Brief of 553 Social Scientists as Amicus Curiae in Support of Respondents at 30, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915), 2006 WL 2927079; GARY ORFIELD, CIVIL RIGHTS PROJECT, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 10–11 (2001), *available at* http://eric.ed.gov/PDFS/ED459217.pdf.

114. Brief of 553 Social Scientists as Amicus Curiae in Support of Respondents, *supra* note 113, at 30.

115. *See* Marta Tienda & Sigal Alon, *Diversity and the Demographic Dividend: Achieving Educational Equity in an Aging White Society*, *in* THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 48, 50–58 (Clive R. Belfield & Henry M. Levin eds., 2007) (describing demographic changes in school aged children in the United States).

nue.[116] Failure to provide the growing number of minority students with adequate educational resources and improved academic achievement may also result in an increase in crime and incarceration rates in the United States.[117] Thus, the costs of continuing to maintain segregated schools and failing to properly educate poor and minority students will be borne not only by the individual students but also by society as a whole.

C. Government Policies Exacerbate Race and Class Segregation in Schools

Federal, state, and local government policies are complicit in fostering race and class-based residential segregation. As discussed in Part II *supra*, the Supreme Court's remedial school desegregation jurisprudence places the problem of school segregation caused by residential segregation outside the purview of the federal courts' remedial powers. The underlying rationale behind the Court's reasoning appears to be that residential segregation is a matter of private choice rather than intentional state action.[118] This Section argues the opposite.

Federal, state, and local government policies all play a pivotal role in creating racial and economic segregation among urban and suburban communities. With respect to federal government policies, after World War II, mortgage insurance programs were established through the Federal Housing Administration that enabled and encouraged middle-class white families to obtain financing for new housing outside core central cities in burgeoning suburbs.[119] At the same time, the Federal Housing Administration maintained underwriting policies that discouraged

116. *See* Cecilia Elena Rouse, *Consequences for the Labor Market*, *in* THE PRICE WE PAY, *supra* note 115, at 99 (finding that in 2005 high school drop outs earned thirty-seven cents for every dollar earned by someone with a high school diploma or more and that such individuals reduced the overall U.S. tax-base).

117. *See* Enrico Moretti, *Crime and the Costs of Criminal Justice*, *in* THE PRICE WE PAY *supra* note 115, at 142 (describing the ways in which educational attainment affects crime and incarceration rates).

118. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 495 (1992) (noting that segregation in the school context is often "a product not of state action but of private choices" and further concluding that "[r]esidential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies").

119. *See, e.g.*, Roberta Achtenberg, Keynote Address at the University of Pennsylvania Law Review Symposium: Shaping American Communities—Segregation, Housing & the Urban Poor, *in* 143 U. PA. L. REV. 1191, 1193 (1995) (describing how FHA programs benefited white citizens in financing suburban homes).

minorities from buying homes in areas outside of the decaying central city.[120]

In fact, the Federal Housing Administration's policies limited the ability of minorities to participate in the overall homeownership bonanza that occurred after World War II as "less than 2 percent of the housing financed with federal mortgage assistance from 1946 to 1959 was available to [Blacks]."[121] To be sure, because the Federal Housing Administration was "deeply committed to financing housing in the suburbs and not [cities]," the federal government played a pivotal role in excluding minorities, particularly Blacks, from residing in the suburbs.[122] The federal government's transportation policies also compounded the problem by subsidizing highways that allowed whites to live in the suburbs while working in central cities.[123] Together, the FHA's racially discriminatory lending practices and the proliferation of federally subsidized highways served to relegate minorities to decaying urban cities while helping to populate suburban enclaves with white citizens.

State and local government policies are similarly culpable in creating and maintaining residential segregation. Many states delegate broad powers to localities that allow them to separate from predominantly poor and minority central cities. As Professor Frug notes, these powers include, among others, the right to incorporate as separate municipalities, the right to zone, and immunity from annexation by the central city.[124] The exercise of these powers typically leads to the proliferation of several separate political subdivisions located adjacent to a larger central city. This phenomenon, popularly known as "urban sprawl," usually leads to poor and minority residents being concentrated in the central city while more affluent whites locate in the suburbs.[125] This is because suburban localities often use land exclusionary zoning mechanisms that prevent poorer populations, usually minorities, from living in

120. *See, e.g.*, Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 677–78 (2002) ("The FHA Underwriting Manual specifically instructed that the presence of 'inharmonious racial or nationality groups' made a neighborhood's housing undesirable for insurance. The Underwriting Manual explicitly recommended racially restrictive covenants, and warned: 'If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes . . . .'"(quoting Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States*, *in* A PROPERTY ANTHOLOGY 208 (Richard H. Chused ed., 2d ed. 1997))).

121. *Id.* at 681 (citing MARK I. GEFLAND, A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA 1933–1965, at 221 (1975)).

122. *Id.*

123. *See* MASSEY & DENTON, *supra* note 100, at 44–45.

124. *See* Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1070 (1996).

125. *See* Orfield, *supra* note 23, at 877–78.

their localities.[126] Examples of such exclusionary zoning tactics include: capping the number of affordable housing units that can be built in a locality, requiring large lots and floor plans to prevent affordable housing from being built at all, or prohibiting multifamily residences from being built.[127]

The federal judiciary's doctrinal stance of treating residential segregation as a consequence of private choice is simply wrong. By treating school and neighborhood segregation as separate phenomena, the Court blindly denies that federal, state, and local government policies are root causes of residential neighborhood segregation. Furthermore, by embracing localism in its school equity jurisprudence at the expense of providing poor and minority students equal educational opportunities, the Court has made it extremely hard for the judiciary to craft school desegregation remedies.

D. Utilizing a New Regionalist Approach to Fighting Racial and Economic Segregation Between School Districts: An Example from the FHA "Affirmatively Furthering" Language

The term "New Regionalism" means utilizing cooperation among localities to solve problems in ways that are attentive to the interests of all neighboring localities rather than the interests of a single locality.[128] In the fair housing context, policymakers are experimenting with new regionalist solutions to combat racial and economic segregation in housing. In particular, Section 808(d) of the FHA provides that the Housing Urban Development ("HUD") Secretary must "administer . . . programs and activities relating to housing and urban development *in a manner affirmatively to further the policies* of this [Act]."[129] Cases interpreting this statutory provision have found that it imposes on HUD an obligation and an affirmative duty to do more than just provide discrimination-free housing.[130]

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126. *Id.* at 878.

127. *See, e.g.*, S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 729 (N.J. 1975) (discussing land use and zoning policies used by the Mount Laurel Township to exclude low-income residents from residing in Mount Laurel).

128. *See* Briffault, *supra* note 21; Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001).

129. 42 U.S.C. § 3608(e)(5) (2006) (emphasis added).

130. *See, e.g.*, NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987) ("HUD [has] an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others)."); Otero v. New York City Hous. Auth., 484 F.2d 1122, 1125 (2d Cir. 1973) ("[HUD] is obligated to take affirmative steps to promote racial

Significantly, in light of demographic changes that have wrought high levels of residential segregation with minorities populating inner cities and inner-ring suburbs and whites populating outer-ring suburbs, courts interpreting HUD's duty under Section 808(d) have found that the affirmative duty includes the duty to "consider regionally-oriented desegregation and integration policies."[131]

For example, in *Hills v. Gautreaux*, the Supreme Court allowed HUD to remedy intentional public housing segregation in the City of Chicago by providing housing opportunities in the greater metropolitan Chicago suburbs.[132] In finding that a remedy involving the greater metropolitan suburbs rather than just the City of Chicago was appropriate, the Court distinguished *Milliken* (which rejected the propriety of a metropolitan school desegregation remedy) on the grounds that "a metropolitan area remedy involving HUD need not displace the rights and powers accorded subur-suburban governmental entities under federal or state law."[133] The Court reasoned that

> local housing authorities and municipal governments [have] to make application for funds or approve the use of funds in the locality before HUD could make housing assistance available. An order directed solely to HUD would not force unwilling localities to apply for assistance under these programs but would *merely reinforce the regulations guiding HUD's determination of which of the locally authorized projects to assist with federal funds.*[134]

The Court further noted that in allowing for a metropolitan remedy, it would allow HUD to comply with its statutory duty "affirmatively to further" fair housing.[135]

Similarly, in *Thompson v. HUD*, the U.S. District Court for Maryland found that HUD violated its statutory duty to "affirmatively further fair housing" by failing to "consider regionally-oriented desegregation and integration policies."[136] More specifically, the Court found that HUD focused its desegregation efforts almost

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integration even though this may in some instances not operate to the immediate advantage of some non-white persons.").

131. *See, e.g.*, Thompson v. U.S. Dep't of Hous. & Urban Dev., 348 F. Supp. 2d 398, 409 (D. Md. 2005).

132. 425 U.S. 284, 302–06 (1976).

133. *Id.* at 298 n.13.

134. *Id.* at 303 (emphasis added) (citation omitted).

135. *Id.* at 302; *see also* 42 U.S.C. § 3608(e)(5) (2006).

136. *Thompson*, 348 F. Supp. 2d at 409.

exclusively on building and demolishing public housing units within the City of Baltimore.[137] Notably, the Court emphasized that "Section 3608 [of the FHA] imposes upon Defendants an 'affirmative' obligation; it requires Defendants to do something 'more than simply refrain from discriminating themselves or from purposely aiding discrimination by others.'"[138] Because HUD failed to consider regional solutions to aid public housing desegregation, particularly options in the counties surrounding Baltimore, the Court concluded that HUD had violated Section 808(d) of the FHA.[139]

As an outgrowth of the *Gautreaux* and *Thompson* cases, two notable housing mobility programs, the Gautreaux Program and the Baltimore Housing Mobility Program ("BHM") were created. The Gautreaux program allowed low-income public housing residents in Chicago to receive a subsidy in the form of a voucher that they could use in the private rental market to move to predominantly white residential areas in the City of Chicago or in the suburbs.[140] The program was widely considered a success as participants in the program experienced increased employment opportunities, access to better schools, and an improved overall quality of life.[141]

Similarly, the BHM program also provides current and former public housing residents on the public housing or the Housing Choice Voucher waiting lists "access to private market housing in low poverty and predominantly white neighborhoods."[142] Although the BHM program was only recently launched in 2003, early research indicates that the program has been successful in improving housing stability, access to quality schools, and overall quality of life for program participants.[143]

Gautreaux and *Thompson* recognized that regional solutions to housing are sometimes the only way to achieve meaningful residential integration. The success of the Gautreaux and BHM programs suggest that the concept of enabling mobility in order to obtain full access to high opportunity areas in both the suburbs

137. *Id.* at 463.

138. *Id.* at 416 (quoting NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987)).

139. *Id.* at 443.

140. *See* James E. Rosenbaum & Stefanie DeLuca, *What Kinds of Neighborhoods Change Lives? The Chicago* Gautreaux *Program and Recent Mobility Programs*, 41 IND. L. REV. 653, 654–55 (2008) (describing the *Gautreaux* program).

141. *Id.* at 656–59.

142. LORA ENGHDAL, NEW HOMES, NEW NEIGHBORHOODS, NEW SCHOOLS: A PROGRESS REPORT ON THE BALTIMORE HOUSING MOBILITY PROGRAM 2 (2009), *available at* http://www.prrac.org/pdf/BaltimoreMobilityReport.pdf.

143. *Id.* at 3.

and city should be emulated in a wide variety of government programs, including the provision of education.

IV. THE NCLB PUBLIC CHOICE PROVISION: LEVELING LOCALISM AND SCHOOL DISTRICT BOUNDARY LINES THROUGH INTER-DISTRICT CHOICE

As discussed above, gross disparities in educational resources between school districts make it difficult for states to provide quality education to all children. Simply put, "[l]iving on one side of a district boundary line or the other can dictate whether a student has access to challenging curriculum, well-prepared teachers, decent facilities, high expectations, non-poor peers, and a wealth of other tangible and intangible factors that influence learning."[144] NCLB attempts to alleviate such disparities by requiring schools to ensure equitable outcomes at a basic level of educational achievement for students of all races and socio-economic backgrounds.[145] It employs a cooperative federalism model in which states develop and manage their own accountability programs approved by the Department of Education, in return for Title I funding.[146]

By increasing the role of the federal government in areas of education policy that have been traditionally regulated by state and local governments, NCLB is often criticized as an impermissible impairment to traditional notions of educational federalism.[147] However, because educational achievement continues to be a national priority, federal involvement in academic achievement and accountability is likely to continue.[148] Furthermore, because most states receive and rely on significant amounts of Title I funding,[149] it is unlikely that any state will decide to opt out of receiving Title I

144. WELLS ET AL., *supra* note 14, at 1.

145. *See* 20 U.S.C. § 6311(b)(2) (2006).

146. *See generally id.* § 6311 (setting forth the process by which states develop accountability and curriculum plans that must be approved by the Department of Education in return for Title I funds).

147. *See* Michael Heise, *The Political Economy of Educational Federalism*, 56 EMORY L.J. 125, 127 (2006) (discussing traditional concepts of federalism in education and how NCLB challenged the federalism status quo in education).

148. *See* Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 26–35 (2010) (discussing the appropriate role of federal and state laws in creating and enforcing laws related to academic achievement and concluding that the federal government should play an important and substantial role).

149. *See* U.S. GEN. ACCOUNTING OFFICE, TITLE I PRESCHOOL EDUCATION: MORE CHILDREN SERVED, BUT GAUGING EFFECT ON SCHOOL READINESS DIFFICULT 5 (2000), *available at* http://gao.gov/new.items/he00171.pdf (noting that 90% of public schools receive some Title I funding).

funding in order to avoid complying with the conditions attached to receiving Title I funding.[150]

Consequently, this Part argues that although NCLB has undoubtedly expanded the role of the federal government in education in an attempt to alleviate race and class-based educational disparities,[151] the Act could do more to lessen the impact that school district boundary lines play in determining educational outcomes for students. This could be done by taking advantage of the fiscal inability of most states to opt out of receiving Title I funding and amending the NCLB public choice provision to include language that facilitates inter-district transfers, similar to the "affirmatively furthering fair housing" language used under the FHA.[152]

This Part provides a brief overview of how the federal government's role in education originated and evolved through the Elementary Secondary Education Act ("ESEA"). It then analyzes the most recent version of the ESEA—NCLB and argues that when the ESEA is reauthorized in 2012, the public choice provision should be amended to encourage inter-district transfers.

A. The Role of the Federal Government in Education Through the ESEA: From Cooperation to Coercion

1. History of Federal Government Involvement in Education Through the ESEA: 1965–2000

Throughout most of American history, the federal government has played a minimal role in the provision of education. The most extensive involvement in the provision of education by the federal government came in 1965 when Congress passed the ESEA as part of President Lyndon B. Johnson's efforts to end poverty.[153] ESEA's

150. Some states have threatened to forego NCLB funding due to their displeasure with the Act's accountability scheme and a lack of federal funding to adequately comply with it. Indeed, Utah and Virginia went as far as passing resolutions and proposed legislation that would have had the states opting out of receipt of Title I spending. However, when faced with the reality of how much federal revenue they would lose if they opted out, both states declined to do so. *See* Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 897–900 (2006).

151. *See* 20 U.S.C. § 6301 (2006). The Act notes that its statement of purpose could be accomplished "closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers." *Id.* 6301(3).

152. *See supra* Section III.D.

153. *See* Elementary and Secondary Education Act of 1965, Pub. L. No. 89–10, 79 Stat. 27 (1965) (amended and reauthorized as NCLB in scattered sections of 20 U.S.C. in 2002).

original purpose was to improve America's elementary and secondary schools by providing states with funding to meet the educational needs of poor children.[154] Notably, although the original purpose of the Act was to assist all poor children, one of the key goals of the Act was to address the deteriorating conditions of inner-city schools, which contained high numbers of poor Black children.[155] By addressing educational inadequacies among the poor, particularly the Black poor, the Johnson administration hoped to boost that group's economic and social mobility.[156]

The ESEA consists of five titles: Title I provides funding to schools serving children from low-income families; Title II provides schools with money to purchase library books and other instructional material; Title III provides funding for services to "at risk" children including after school programs; Title IV provides funding for college and university research on education; and Title V provides funding to individual state departments of education.[157]

Title I is by far the most significant part of the ESEA. Title I distributes federal money to local school districts according to the number of poor students in the school district. School districts in which at least ten children and 2% of the overall student population are classified as poor are eligible to receive Title I funding.[158] Given this low threshold, "almost all school districts, even very affluent school districts," receive some Title I funds.[159] School districts with predominantly minority populations have high percentages of students classified as living poor and therefore receive larger amounts of Title I funding.[160]

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154. *See id.* § 205(a)(1); *see also* S. REP. No. 146, at 4 (1965) ("The solution to these problems [of American education] lies in the ability of our local elementary and secondary school systems to provide full opportunity for a high quality program of instruction in the basic educational skills because of the strong correlation between educational underachievement and poverty.").

155. *See* JULIE ROY JEFFREY, EDUCATION FOR CHILDREN OF THE POOR: A STUDY OF THE ORIGINS AND IMPLEMENTATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965, at 29–30, 65 (1978) (discussing the planning of the ESEA and the Kennedy and Johnson administrations' desire to focus any comprehensive federal education legislation on young Blacks on the theory that education offered hope for economic improvement amongst this group).

156. *Id.* at 30–31.

157. Elementary and Secondary Education Act, 79 Stat. 27; JEFFREY, *supra* note 155, at 77–78.

158. *Improving Basic Programs Operated by Local Educational Agencies (Title I. Part A)*, U.S. DEP'T OF EDUC., http://www.ed.gov/programs/titleiparta/index.html (last modified Jan. 27, 2010).

159. *See No Child Left Behind Act—Title I Distribution Formulas*, FEDERAL EDUCATION BUDGET PROJECT, http://febp.newamerica.net/background-analysis/no-child-left-behind-act-title-i-distribution-formulas (last visited Mar. 9, 2011).

160. *See* DIANE M. PICHE ET AL., TITLE I IN MIDSTREAM: THE FIGHT TO IMPROVE SCHOOLS FOR POOR KIDS 1–3 (Corrine M. Yu & William L. Taylor eds., 1999) (quoting

Between 1965 and 1994, Congress reauthorized the ESEA several times. In each reauthorization, Congress placed only minimal conditions on the receipt of funding under the Act.[161] However, in 1994, when Congress reauthorized the ESEA as the Improving America's Schools Act ("IASA"), Congress shifted to a standards-based reform approach. "The purpose of the IASA was 'to enable schools to provide opportunities for children served to acquire the knowledge and skills contained in challenging State content standards . . . .' "[162] As a precursor to NCLB, IASA required all school districts to identify schools that were not making Adequate Yearly Progress ("AYP"). Significantly, however, IASA did not impose financial penalties or otherwise sanction schools that were not making AYP.[163] Instead, IASA only required school districts to demonstrate that formal steps were being taken to improve schools that were not making AYP.[164]

2. NCLB: Expanding the Role of the Federal Government in Education

ESEA's influence on education policy increased exponentially in 2001 when Congress reauthorized it as the No Child Left Behind Act. It dramatically changed the balance of power between the federal and state government in the provision of education. For the first time in the history of the ESEA, to achieve its stated goal of "ensur[ing] that all children have a fair, equal and significant opportunity to obtain a high-quality education,"[165] NCLB requires schools to comply with rigorous teaching, testing, and accountability schemes as a condition for receiving Title I funds.[166] More specifically, the Act requires public schools to annually test

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MICHAEL J. PUMA ET AL., PROSPECTS: THE CONGRESSIONALLY MANDATED STUDY OF EDUCATIONAL GROWTH AND OPPORTUNITY—INTERIM REPORT 18 (1993)), *available at* http://www.eric.ed.gov/PDFS/ED438372.pdf. Admittedly however, the Title I funding scheme has come under attack recently for being a source of inequity in educational services for students in high-poverty schools. *See, e.g.*, Havard, *supra* note 112, at 125 ("Because it allows for discretion in the allocation of federal monies, Title I federal funding regime has become a source of inequity in educational services for students in high-poverty schools.").

161. *See* Janet Y. Thomas & Kevin P. Brady, *The Elementary and Secondary Education Act at 40: Equity, Accountability and the Evolving Federal Role in Public Education*, 29 REV. OF RES. IN EDUC. 51, 53, 63 (2005).

162. *Id.* at 54–55 (quoting Improving America's Schools Act of 1994, Pub. L. No. 103-382, 1001(d), 108 Stat. 3518).

163. *See id.* at 57.

164. *Id.* at 55.

165. 20 U.S.C. 6301 (2006).

166. *See id.* 6311(b)(1).

students in math, reading, and science.[167] Each year, schools must show steady improvement in standardized test results for every grade and for multiple demographic groups, including minorities, English language learners, and socio-economically disadvantaged students.[168] The results of the annual tests, along with other measurements such as attendance and graduation rates, are used to determine whether a school is making AYP toward 100% proficiency for all students by the 2013–2014 school year.[169]

If a school that receives Title I funds fails to make AYP, the school is identified as "in need of improvement."[170] Once a Title I school fails to make AYP for two consecutive years, the school enters "improvement status" and a series of remedies are afforded to students attending the school, including the right to transfer to a non-failing school or to take advantage of supplemental education services such as tutoring for students who elect to remain at the school.[171]

B. The NCLB Public Choice Provision

1. Statutory Scheme

An important but often overlooked part of the NCLB statutory scheme is the public choice remedy.[172] In a concession to the time and effort needed to reform schools that are not meeting NCLB's AYP requirements, the public choice remedy requires schools in "improvement status" or further along in the NCLB remedial phase to offer students the opportunity to transfer to a better-performing school.[173] In essence, the local school district is re-

167. *Id.* 6311(b)(3)(A).

168. *See id.* § 6311(b)(2)(C)(v)(II). This lesser known, yet useful, component of NCLB is the race and class-conscious accountability scheme contained in the Act. The accountability scheme requires schools to disaggregate student performance data into four subgroups for purposes of determining whether a school has complied with the academic performance requirements. The four subgroups are: "economically disadvantaged students"; "students from major racial or ethnic groups"; "students with disabilities"; and "students with limited English proficiency." *Id.* If *any* subgroup of a school fails to meet its AYP for two consecutive years, the school is identified as a school in need of improvement and subject to sanctions. *See id.* 6316(b)(1)(A). Thus, a school can be deemed in need of improvement and subject to sanctions if the majority of students met the performance requirements but a single subgroup of students (e.g., socioeconomically disadvantaged students) fails to do so. *See id.* § 6311 (b)(2)(I).

169. *See id.* §§ 6311(b)(2)(C)(vi–vii), 6316(b)(3)(A)(v).

170. *See id.* 6316(b)(1)(A).

171. *Id.* 6316(b)(5)(1)(E)(i).

172. *See id.*

173. *See id.*

quired to provide each student attending a school that fails to make AYP for two consecutive years with a choice of alternative public schools (including charter schools) that *are* making adequate yearly progress to which the student can transfer.[174]

If there is more than one school within the school district to which the student may transfer, the school district must provide the parent with a choice of more than one school and take into account the parent's preference in choosing a school.[175] In keeping with the Act's mission of ensuring an adequate education for disadvantaged students, school districts are required to give low-performing students from low-income families priority in exercising the right to transfer.[176] Critically, school districts are only required to offer the student an opportunity to transfer to a school that has made AYP within the *same* school district.[177] If there are no other eligible schools within the school district to which the student can transfer, the school district is encouraged "to the extent practicable [to] establish a cooperative agreement" with nearby school districts to accept transfers.[178] The school district may also offer supplemental educational services or tutoring to eligible students if there are no other eligible schools to which the student can transfer within the school district, but only if the school is in its first year of "improvement status."[179] The school district can under no circumstances use "lack of capacity" or lack of eligible schools as a basis for denying a student the opportunity to transfer to a better-performing school.[180]

2. Obstacles to Effective Utilization of the Public Choice Provision

Despite these statutory safeguards, designed to ensure that students can take advantage of the transfer option, the public choice provision remains under-utilized. A 2007 U.S. Department of Education report analyzed the use of the public choice option in nine large, urban districts and found that a mere 0.5% of the students eligible to transfer to a higher-performing school actually

174. *Id.*
175. 34 C.F.R. § 200.44(a)(4)(i)–(ii) (2008).
176. *See id.* 200.44(e)(1)
177. *See* 20 U.S.C. 6316(b)(E)(1).
178. 34 C.F.R. 200.44(h)(1).
179. *Id.* 200.44(h)(2).
180. *Id.* 200.44(d).

exercised this right.[181] Much criticism has been levied at school districts for their ineffective implementation of the transfer provision, particularly their failure to notify parents and students of their right to transfer in time for the students to exercise the transfer option.[182] The U.S. Department of Education, in an attempt to remove these barriers, issued regulations in October 2008 requiring, among other things, schools to provide "timely and clear" notification to parents and students of their rights to transfer to a better-performing school.[183]

While the recent regulations may address one obstacle to effective utilization of the public choice provision, they do not address one of the key obstacles: lack of viable transfer options due to the intra-district restriction on the transfer provision. Conceptually, the NCLB public choice provision is on the right track by allowing for student mobility in order to increase educational opportunities for students. By encouraging cooperative agreements between school districts and prohibiting schools from using "lack of capacity" as a basis to deny students the right to transfer, the public choice statutory provisions and regulations undoubtedly attempt to ensure that some choice of a transferring school is available to students. In reality, however, effective use of the public transfer option is constrained both by the lack of viable intra-district transfer options and the lack of incentives for school districts to create viable options. As noted earlier, poorer-performing schools that are required to implement the public choice remedy are typically clustered within the same school districts.[184] As a result, the geographic limitation of transfers to "intra-district" transfers often means that students eligible to transfer will have only a nominal choice of schools to choose from because many of the schools within the

181. RON ZIMMER ET AL., STATE AND LOCAL IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT: VOLUME 1—TITLE I SCHOOL CHOICE, SUPPLEMENTAL EDUCATION SERVICES, AND STUDENT ACHIEVEMENT 8 (2007), *available at* http://www.eric.ed.gov/PDFS/ED497259.pdf.

182. *See, e.g.*, BROWN, *supra* note 10, at 63 (noting the inconsistencies and inadequacies in school procedures for notifying students and parents of their right to transfer); Frederick M. Hess & Chester E. Finn Jr., *Inflating the Life Rafts of NCLB: Making Public Choice and Supplemental Services Work for Students in Troubled Schools*, 86 PHI DELTA KAPPAN 34, 34–39 (2004) (noting that "[d]istricts unenthusiastic about the NCLB remedies can and do drag their feet in myriad ways: sending parents indecipherable letters, making a 'needs improvement' label on a school sound like a badge of honor, providing unclear direction (and plenty of red tape) to parents regarding their options").

183. *See* U.S. DEP'T OF EDUCATION, STRENGTHENING CHOICE AND FREE TUTORING 1, 3 (2008), *available at* http://www.ed.gov/policy/elsec/reg/proposal/strengthening-choice.pdf.

184. *See, e.g.*, BROWN, *supra* note 10, at 63.

school district will also be in "improvement status" and ineligible to receive transfers.[185]

Furthermore, although the Act encourages school districts to establish cooperative agreements with neighboring school districts to accept transfers, higher-performing school districts have no incentive to enter into such an agreement. This is because large numbers of students from poorly performing schools are likely to decrease the overall academic performance of a school. AYP-compliant schools and school districts therefore have no incentive to enter into such agreements if they fear that incoming students will negatively impact their academic performance scores and put them in danger of not meeting their own AYP requirements.[186] Moreover, although charter schools are eligible to receive transfers under the Act, most high-performing charter schools have long waiting lists and are unlikely to be able to accommodate transfer requests.[187] All these factors mean that there is often not enough space in AYP-compliant schools to provide viable transfer options for more than a handful of students. Consequently, the public choice remedy in its current form provides students a right without a viable remedy to exercise that right.

C. Taking a Regionalist Approach to Public Choice: Suggested Changes to the Public Choice Provision

1. Incorporating an "Affirmative Duty" into the NCLB Statutory Framework

As discussed in Section III.D, the FHA mandates that HUD take affirmative action to further fair housing. FHA's Section 3608(e)(5) statutory language and cases interpreting the scope of that language provide an analytical framework that allows for citizen mobility by requiring HUD to act regionally, rather than

185. *See, e.g.*, Erin Dillon, *In Need of School Improvement: Revising NCLB's School Choice Provision*, *in* IDEAS AT WORK 1, 1 (2008), *available at* http://www.educationsector.org/usr_doc/NCLB_Choice_Idea_at_Work.pdf (noting that in 2004, 175,000 students were eligible to utilize the NCLB public choice provision but only 438 students or less than 1% utilized the transfer option "due to a scarcity of nearby higher-performing schools and competition for space in those schools from the many lower-performing schools in Chicago").

186. *See* Hess & Finn, *supra* note 182, at 37.

187. *Cf.* ERICA FRANKENBERG ET AL., CIVIL RIGHTS PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 37 (2010), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report (finding increased racial segregation in charter schools and that higher performing charter schools have stringent requirements for admission and sizeable waiting lists).

locally. Such a framework, if emulated, would increase the effectiveness of the NCLB public choice provision. In particular, language could be added to NCLB similar to the Section 808(d) language requiring school districts—referred to as Local Educational Agencies ("LEA") in the Act—to "affirmatively further" the educational achievement of all racial, ethnic, and socio-economically disadvantaged groups. In the FHA context, the inclusion of the "affirmatively further" language has meant that HUD is required to take affirmative action to fulfill the FHA's stated goal of maintaining open, integrated housing patterns.[188]

NCLB's stated goals are, among other things, "meeting the educational needs of low-achieving children in our Nation's highest-poverty schools"[189] and "closing the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers."[190] If language similar to Section 808(d) of the FHA were added to the NCLB, it could also be construed to require states and LEAs to do more than simply offer a basic level of education. In particular, as evidenced in the FHA cases interpreting the Section 808(d) language,[191] adding similar "affirmatively furthering" language to NCLB could mean that states and LEAs have a duty to act regionally where necessary in order to "close the achievement gaps between minority and nonminority students" and to meet the needs of low-achieving students in high-poverty schools.

To the extent that mobility programs similar to the Gautreaux and BHM programs have been tried in the education context, such programs have been successful. For example, successful interdistrict school desegregation plans are currently in place in a number of cities such as St. Louis, Missouri[192] and Hartford,

188. *See* Otero v. New York City Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973) (reasoning that 3608(d)(5) requires HUD to take action "to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat").

189. 20 U.S.C. § 6301(2) (2006).

190. *Id.* § 6301(2).

191. *See, e.g.*, Gautreaux v. Chi. Hous. Auth., 503 F.2d 930, 936 (7th Cir. 1974) ("After careful consideration and reflection we are obliged to conclude that on the record here it is necessary and equitable that any remedial plan to be effective must be on a suburban or metropolitan area basis."); Thompson v. U.S. Dep't of Hous. & Urban Dev., 348 F. Supp. 2d 398, 458 (D. Md. 2005) (finding that "HUD must take an approach to its obligation to promote fair housing that adequately considers the entire Baltimore Region").

192. The St. Louis inter-district transfer plan, like the Gautreaux and BHM programs, is an outgrowth of a lawsuit alleging *de jure* school segregation. Liddell v. Bd. of Educ., 469 F. Supp. 1304, 1309–12 (E.D. Mo. 1979), *rev'd and remanded*, Adams v. United States, 620 F.2d 1277, 1281–84 (8th Cir. 1980), *cert. denied*, 449 U.S. 826 (1980). In 1980, the district court

Connecticut. A long-term study of these programs has concluded that students who transfer out of poor, urban school districts into more affluent suburban school districts typically score higher on standardized tests than their peers who remain in urban schools.[193] The inter-district programs have also helped to improve racial attitudes in the suburbs and have empowered minority parents to mobilize in order to obtain better educational opportunities for their children.[194] The success of these mobility programs in both the housing and education context is a promising sign that they should be replicated on a larger scale through the NCLB public choice provision.

2. Recalibrating AYP Accountability Scheme on the Regional Level Rather than the School District Level

The NCLB accountability system could be amended to hold LEAs accountable for making AYP on a regional rather than an individual basis. Currently, as discussed in Section IV.A.1.(i), the Act's accountability scheme requires individual schools and school districts to meet AYP requirements and imposes penalties on individual schools and school districts that fail to make AYP.[195] NCLB could be amended such that the states are responsible for carving out regional zones that encompass LEAs or school districts that are in close geographic proximity to one another. In addition to each individual school and school district being required to make AYP, each regional zone identified by the state should also have to make AYP. If the regional zone as a whole fails to make AYP, each school district that comprises the regional zone should be penalized as discussed *infra* in Section IV.C.ii. More importantly, the public choice provision should be amended to require schools that fail to make AYP to offer students the opportunity to transfer to any school within the regional zone that is within a reasonable driving distance from the transferee home school. Amending the NCLB accountability scheme generally and the public choice provision specifically in this manner furthers the

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ordered the implementation of a desegregation plan within the city schools. Liddell v. Bd. of Educ., 491 F. Supp. 351 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir. 1981), *cert. denied*, 454 U.S. 1091 (1981). In 1983, the parties entered into an agreement that created a voluntary inter-district transfer program in which African-American students from the city of St. Louis were permitted to attend certain suburban schools and white suburban students were permitted to attend city schools.

193. *See* WELLS ET AL., *supra* note 14, at 5.

194. *See id.* at 7–12.

195. *See* 20 U.S.C. § 6316(a)–(b).

goal of utilizing a regionalist approach rather than a localist approach toward equalizing educational opportunities for poor and minority students.

3. Fiscal and Accountability Incentives Should Be Incorporated into the Public Choice Provision to Encourage Inter-District Transfers

In addition to amending the general NCLB statutory scheme to include an "affirmatively furthering" requirement and holding LEAs responsible for making AYP on a regional basis, the public choice provision should be amended to include fiscal incentives to induce inter-district transfers. As other scholars and education activists have noted, one of the primary impediments to effective inter-district plans is cost, particularly transportation costs and costs incurred by the school district receiving the transferee student.[196] A separate funding stream should be created so that states and not the individual school districts (i.e., neither the sending nor receiving school district) should be required to bear the costs of transportation or any other costs associated with the transfer.[197]

Another concern associated with inter-district transfers is that the AYP calculations for the receiving school district may decline, discouraging school districts from taking on transfers.[198] To address this concern, the Act should be amended such that schools that receive large numbers of transfer students can have those students counted out for AYP calculations for an appropriate length of time (i.e., one year). Along these same lines, transfer students should be afforded additional education services, such as tutoring to help them improve their academic skills if necessary.

Finally, LEAs that fail to make AYP on the regional basis, discussed *supra* in IV.C.ii., should be penalized financially with a penalty or deduction of ESEA funds levied on each individual LEA. Such a financial penalty will hopefully inspire cross-collaboration between LEAs on a regional basis.

196. *See* BROWN, *supra* note 10, at 59–70.

197. *Id.* at 63.

198. *See, e.g.*, Abigail Aikens, Note, *Being Choosy: An Analysis of Public School Choice Under No Child Left Behind*, 108 W. VA. L. REV. 233, 248 (2005).

CONCLUSION

School district boundary lines play a vital role in dictating educational opportunities for students. The federal judiciary has fervently embraced localism in its school equity jurisprudence, making it unlikely that federal courts will act to mitigate the inequities caused by school district boundary lines. Moreover, the likelihood of obtaining racial and economic residential integration is minimal at best, particularly in light of exclusionary zoning and other practices that contribute to residential segregation. Consequently, in order to help alleviate the educational inequities caused by racially and socio-economically segregated schools, access to high-quality schools and educational resources must be disentangled from access to middle-class and affluent residences.

In this Article, I have argued that the public choice provision should be amended to better facilitate inter-school district transfers. Due to the cooperative federalist nature of the NCLB statutory scheme itself and the practical inability of states to opt out of receiving Title I funding, the NCLB public choice provision is an ideal point from which to reform the NCLB and to challenge the localist paradigm that dominates the provision of education in America. This Article proposes revising the NCLB to require school districts to "affirmatively further" the educational achievement of all groups, thereby encouraging school districts to participate in more cross-district collaboration transfer plans. Such an approach should help reverse the segregative effects of educational localism and equalize educational opportunity for poor and minority students.